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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TRAVIS COOPER, Defendant and Appellant.	B213116 (Los Angeles County Super. Ct. No. GA066001)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry Smerling, Judge. Affirmed in part and reversed in part.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

At his second trial,[1] a jury convicted Travis Cooper (appellant) of first degree murder (Pen. Code, § 187, subd. (a))[2] (count 1), possession of a firearm by a felon (§ 12021, subd. (a)(1)) (count 2), and conspiracy to commit a crime (§ 182, subd. (a)(1)) (count 4). [3] The jury found that a principal intentionally discharged a firearm, proximately causing death under section 12022.53, subdivisions (d) and (e)(1) and that appellant committed the offenses for the benefit of a criminal street gang under section 186.22, subdivision (b)(1). The trial court found that appellant had one prior serious felony conviction within the meaning of the Three Strikes Law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d) and that he served a prior prison term (§ 667.5, subd. (b)).

In count 1, the trial court sentenced appellant to a term of 25 years to life in prison, doubled to 50 years due to the prior strike. The trial court added 25 years for the allegation pursuant to section 12022.53, subdivisions (d) and (e)(1). The trial court imposed an aggravated concurrent term of three years, doubled to six years because of the prior strike, in count 2. The trial court imposed a sentence of 25 years, doubled to 50 years to life, in count 4 and ordered the term to run concurrently. Appellant's total term is 75 years to life.

Appellant appeals on the grounds that: (1) the prosecution presented insufficient evidence upon which to uphold the convictions on appeal; (2) the trial court prejudicially erred by denying appellant's motion for posttrial access to the jurors to conduct further investigation and prepare a motion for new trial; (3) appellant's conviction in count 4 must be stayed pursuant to section 654, since it was based on the same acts underlying his conviction in count 1; (4) reversal of the true finding on the gang enhancement

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1 Appellant was initially tried along with codefendant John Allah (Allah). The trial court declared a mistrial with respect to appellant when the jury deadlocked with respect to all counts charged against him.

2 All further statutory references are to the Penal Code unless otherwise indicated.

3 Count 4 of the amended information was renumbered as count 3 for the jury and on the verdict forms.

allegation in counts 1, 2, and 4 is necessary because the prosecution's evidence was insufficient to establish the "pattern of criminal activity" element required to support the allegation; and (5) the abstract of judgment must be amended with respect to the enhancement under section 12022.53.

FACTS

On the night of January 20 to January 21, 2006, Edward Smith (Smith) was attending a party in the area of El Sereno Avenue and Fairoaks Drive in Pasadena. Draper Manning (Manning), the murder victim, was at the party, and Smith knew him as a member of the Pasadena Denver Lanes (PDL) gang. After Smith returned from taking a plate of food to Manning, who was standing outside, Smith heard shots. Smith saw someone shooting from the front or rear passenger seat of a gold or white Ford Focus. The shots were fired over the roof of the car. Manning, who was nearer the driver's side of the Focus, was shot. He dropped to the ground holding his chest. Smith heard two more shots as the car drove south. At trial, Smith said he believed the Focus had only two occupants. He acknowledged telling Detective Julianna Finney there were two or three, or perhaps three or four, people in the car. The shooter said something like, "Got you, nigger," and he sounded "like he was black." Smith told Detective Finney that the shooter's hand was black, but he was not sure because it was dark. Smith identified photographs of the Focus shown him by Detective Finney.

Manning died from a gunshot wound to the back that passed through his left lung, aorta, and right lung. He was also hit in his right thigh.

Approximately two hours after the shooting, Corporal Alejandro Peinado of the Pasadena Police Department responded to 242 Bellefontaine Street at 2:19 a.m. The resident at that address had reported hearing a crash and seeing an abandoned car in his driveway approximately two hours before. The resident said that his backyard sensor lights had gone on, and he heard running through the alley at the rear of his home. Corporal Peinado found a 2005 silver Ford Focus in the driveway with its engine running and the lights on. The driver's door and the passenger door behind it were open, and the

top was riddled with bullet holes. The car had become stuck after it ran into a gate post. Two bullets had penetrated the roof in a downward trajectory. The car contained a rental contract in John Allah's name. A small amount of marijuana and two cell phones were in the car.

The phone in the front center console had a dead battery. The other phone, found on the rear floorboard, displayed a received call from a "D-Short." Outside the car, Corporal Peinado found one 9-millimeter live round and a dark jacket.

Laura Denham (Denham) had been in a dating relationship with Allah from 2002 to December 2005. Denham knew Allah was a member of the Altadena Bloc Crips (ABC) gang. Denham did not like Allah's gang friends, but she approved of Daniel Duncan (Duncan) and Chetu Davis (Chetu), whom she did not believe to be members of the ABC. Denham still had contact with Allah after their breakup, and she agreed to take him to a car rental agency on January 19, 2006, where Allah rented a silver car. Perhaps a couple of days later, Allah called her to pick him up in Glendale at 1:30 a.m. He told her someone had shot at his car, and the car had been stolen. Allah exited an apartment complex and got into Denham's car. Allah said they had to go to a motel, and they got a room in a motel in Eagle Rock. When Allah undressed, Denham saw that his legs were skinned, and he had a graze wound on his head from a bullet. Allah said someone shot at him on El Sereno Avenue, which Denham knew to be in Blood gang territory. Allah said he was driving with a friend in the rental car and had to abandon his car near Huntington Hospital after being chased. His friend's girlfriend had picked him up.

At the motel, Allah made five to eight calls with Denham's phone. He was asking the people he called if they knew where Chetu was. Duncan arrived and stayed with them for an hour. In the morning Denham and Allah drove to Chetu's house. There, Chetu's brother Cap Davis (Cap) got in the car. They drove to Denny's in Arcadia, and Duncan showed up with Chetu, who was limping. Chetu said he had hurt his leg jumping over a wall. While Denham sat with the men she received a call from Detective Finney who wanted to talk to her about a homicide that had occurred the night before. Denham

told Allah about the call, and she then went to meet Detective Finney at her parents' home. Denham lied to Detective Finney and told her she knew nothing. Allah called the Denham home and asked Denham over the speaker phone if she knew the whereabouts of his car keys because he could not find his car. Allah later showed up at Denham's home with a female named Nicole Foster (Foster), who was also called Knick Knack. Foster told police she had been with Allah the night before. Denham later met with an attorney who advised her to tell the truth, and she then told police what had happened.

Denham had never heard appellant's name during the time she dated Allah, and she had never met appellant. She was not able to identify his photograph when Detective Finney showed her a series of photographs.

Vivian Charles (Vivian) is the mother of Jamaal Charles (Jamaal), also called "Jelly," who lived with her in Altadena. Vivian knew appellant because he had been to her home quite a few times and was a friend of Jamaal's. Allah had also been to her home. Manning had formerly lived in their neighborhood. Jamaal's girlfriend Tamika called Vivian after midnight in January 2006 to tell her that Manning had been shot. Jamaal was not home. Jamaal had a cell phone and a "chirp" phone, which functioned as a walkie talkie. Vivian called Jamaal on his cell phone and Jamaal said he was with Tiny at Tiny's house on Mendocino.[4] Vivian did not know who Tiny was. There was graffiti on Vivian's garage with the initials "WS" for west side and "ABC" for Altadena Bloc Crips (ABC). Jamaal denied being a gang member to Vivian and said his gang friends were just his associates.

Jamaal testified at appellant's trial after being guaranteed immunity. He had known appellant for over 10 years, and he also knew Allah. He was not a member of the ABC or any gang, but he assumed their territory was Altadena because of the gang's name. To his knowledge, appellant and Allah were not ABC members. Jamaal did not know anyone named Chetu or Chet Davis, but he knew Andrew Alejos and Troy Dickens

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4 Jamaal identified Tiny as appellant during his police interview.

(Dickens). Dickens was not a member of ABC. Cecelia Bowen (Bowen) used to be appellant's girlfriend.

Jamaal grew up with Manning but did not know him to be a member of PDL. On the night of January 21, 2006, Jamaal was at appellant's home at just after midnight.

Jamaal had a regular phone and a chirp phone. Appellant had three phones, including a chirp phone. Previously Jamaal had testified he knew of only one phone—a chirp phone—possessed by appellant. Someone named Biscuit[5] had Jamaal's chirp phone nearly the whole night of January 21, 2006. Previously Jamaal said that Biscuit had his phone that night for "a minute" while they sat in the car, and Jamaal had the phone at all other times. Jamaal rode Biscuit's bicycle over to appellant's that night, and Biscuit rode on the handlebars. Jamaal did not know Biscuit's real name. Jamaal, Biscuit, and appellant sat in appellant's green Camaro and listened to the radio and drank Hennessey.

As they sat in the car, Jamaal's mother telephoned him on his cell phone and told him that Manning had been shot and had died. Jamaal went home at his mother's request after about five minutes. Biscuit still had Jamaal's chirp phone when Jamaal went home. Jamaal claimed he had not seen Biscuit since that day, and he had so testified previously. Jamaal then testified that Biscuit handed him the chirp phone on the day following the shooting. Jamaal identified a photograph in court (People's exh. No. 11) as Biscuit.

Jamaal did not recall if he telephoned appellant before going to appellant's house. When asked if he had telephoned appellant that night *after* going to appellant's house, Jamaal said that if he had, the phone had dialed appellant's number by itself in his pocket. Jamaal did not recall if appellant telephoned him after midnight. He did not recall any phone conversations with Allah or appellant that night. He then thought that he had called appellant at 2:00 a.m., using his house phone, to make sure appellant was okay. He did not recall if appellant answered the phone.

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5 In his police interview, Jamaal identified Biscuit as the shooter. Biscuit was identified as Steven Holmes.

Jamaal repeated that he went home approximately five minutes after his mother called him, and he did not telephone his home at 1:45 a.m. He stated that his phone can go off in his pocket and call anybody when he sits down. He did not intentionally call appellant at 2:55 a.m. either.

Jamaal testified that the police made him lie when he was interviewed a couple of months after the murder. They told him to say he was not with appellant on the night of the 20th to the 21st. They told him to say that appellant telephoned him approximately 10 minutes before the murder to say, "Biscuit's a rider." They told him what to say, sentence by sentence, and he repeated it. They told him to say appellant had asked Jamaal on the phone to find out what his people were saying. Police told Jamaal to say there were two guns involved in the shooting.

A recording of Jamaal's police interview was played for Jamaal and the jury. During the interview, Jamaal said he did not know how his prints came to be on the car. When Detective Steve Long asked Jamaal what Travis told him when he called, Jamaal replied, "Biscuit's a rider." Detective Long asked what that meant, and Jamaal replied, "Obviously they're saying that's who done it." Detective Long asks, "So it was, it was Travis and Biscuit, John Allah in the car? Jamaal replies, "I don't know if Tiny was in the car with them or not." Travis called Jamaal back when Jamaal was at his parents' house to say, "Call your peoples. See what's the word is."

Jamaal was asked to point out when he received instructions on what to say. Jamaal said that the tape did not play the beginning of the interview. The officers also stopped the tape and cut parts out of it. They got him to say stupid stuff because he had no water and was dehydrated. The police tortured him.

Jamaal wrote "Daffy" on a piece of paper during the interview because that is what the police wanted him to write. Jamaal took the piece of paper and put it in his mouth and began to chew it up during the interview. He did that because he knew it was not true and wanted no one to see it. He then said the police told him to chew it up or burn it. Jamaal said that the police wrote the name down first. They told Jamaal to say

that Biscuit did not use the name "Biscuit" anymore and that he used the name "Daf" instead. Jamaal acknowledged he was already known in the neighborhood as a "snitch," but he always gave police false information, and he said what the police told him to say.

Jamaal testified that Biscuit used Jamaal's phone and chirped appellant's phone to help appellant find it in the car. Jamaal told the police about Biscuit because he wanted Biscuit to get arrested. Then Biscuit could testify and tell everyone that appellant did not participate in the murder because appellant was sitting in his car with Biscuit and Jamaal at appellant's house. Jamaal did not recall that he previously told police that "Biscuit's a rider" meant putting in work for the gang, such as shooting people.

Duncan testified that he was never involved in the ABC gang. He knew Allah and appellant. He did not know if Allah or Jamaal were members of ABC and did not believe appellant was. He knew Chetu, who was not a member of the gang. Duncan knew no members of the ABC gang.

On the night of the shooting Duncan paged Allah and then went to the hotel where Allah was staying in order to buy marijuana from Allah. There was someone else in the room under the covers. He did not remember if Allah talked about being carjacked or about a shooting. Allah had no injuries.

Duncan acknowledged that he told Detective Finney that Allah parked his car at Denham's house on the day before the shooting at approximately 6:00 p.m. Duncan told the detective that he had not seen Allah since then. When Detective Finney told Duncan he was on videotape at the hotel, Duncan admitted calling Allah at 2:00 or 3:00 in the morning. He told Detective Finney that Allah said the rental car was gone and he was in trouble. Duncan acknowledged on the stand that this story was the true one. Duncan did not recall if Chetu was at Denny's the next day, and Duncan did not see Denham or Cap there. When presented with his prior testimony that he waited for Allah at Denny's for 15 minutes and Allah did not show up, he said he believed he did meet with Allah.

On January 5, 2006, Detective Long arrested Bowen in a car while appellant was standing five feet away from the car. Bowen asked Long to leave her cell phone with appellant. Appellant had admitted his membership in ABC to Detective Long.

Detective Finney was assigned to investigate Manning's murder. Duncan gave her two versions of his encounters with Allah on the night of the 20th to the 21st of January. In the second version Allah told Duncan that something had happened to the rental car and he was in trouble. Detective Finney learned during the investigation that appellant was called "Tiny."

Detective Finney interviewed Allah and observed injuries to his legs, knees and head. Allah gave different stories as to what had happened to his rental car. Allah denied being an ABC member, but he had the gang's tattoos.

Jamaal was arrested when Detective Finney executed several search warrants of ABC gang members, and a substance that appeared to be narcotics was found in Jamaal's residence. Warrants were also served on Chetu, Steven Holmes, and Laron Brown. Laron Brown was later shot and killed on Manning's birthday. A .38-caliber live round and a box of .38-caliber ammunition were found at Chetu's home. Either .38 or .357 ammunition was used to shoot Manning. Police were told that the weapon in Manning's homicide was a .38 revolver.

The recordings of Jamaal's interview were not edited. Jamaal wrote "Daffy" on a piece of paper because he did not want to say the name aloud. He said Daffy was the person involved in the crime. It was determined that Daffy was Steven Holmes. Steven Holmes was the same person Jamaal identified in People's exhibit No. 11 as Biscuit. The police did not suggest to Jamaal that he eat the paper.

Ballistics evidence found at the shooting scene included an expended nine-millimeter projectile and another projectile that could have been a .38 or a .357. No one told Jamaal to say there were two guns in the shooting, and police originally believed there was only one. Manning was shot at approximately 12:22 to 12:25 a.m., and the call

about the crashed car on Bellefontaine Avenue was made at 12:32 a.m. The gunshot damage to the crashed car was from the back to the front and right to left.

The cell phone found behind the driver's seat of the Focus had a number listed under "Mom." This phone number was the voicemail for Janice Cooper (Janice), and Detective Finney confirmed that this was Janice's number. This phone was registered to a Cecelia Bowman, whom Detective Finney believed to be Cecelia Bowen.

The cell phone in the front seat of the Focus was Allah's. The battery was dead, which was consistent with Allah's account that it died on the afternoon of January 20. Detective Finney obtained both chirp and regular cell-phone records for Cecilia Bowman's phone (the Bowman phone) from the rear of the Focus, and Allah's phone. Detective Finney obtained phone records for Jamaal's chirp number and telephone number. She also obtained records for Foster's (Knick Knack's) phone, Denham's phone, and Janice's phone. Janice's phone was regularly used by appellant. Detective Finney also obtained a search warrant for the phone records of Michelle Glover (Glover), who was the person in whose apartment Allah stayed before Denham picked him up.

There were phone calls between Jamaal's phone and Janice's phone all day long on January 20, 2006. On the morning of the 21st, Jamaal's phone chirped the Bowman phone used by appellant at 12:12 a.m. The Bowman phone chirped back at 12:13 a.m. At 12:37 a.m., the Bowman phone called Denham's cell phone. At 12:35 a.m., the Bowman phone called Foster's cell phone. At 12:41 a.m., Jamaal's house phone called his cell phone. At 12:57 a.m., the Bowman phone called Glover's cell phone. At 1:27 a.m., Jamaal's cell phone called the Bowman phone. At 1:45 a.m. Jamaal telephoned his own home.

Latent prints from the outside of the Focus belonged to appellant, Jamaal, Chetu, Andrew Alejos and Dickens. Appellant's fingerprints were found on the front driver's side door of the car. No fingerprints belonging to appellant were on the inside of the car. However, no identifiable prints of anyone were found there. No prints were lifted from the Bowman phone.

Detective Richard Pippin of the Los Angeles County Sheriff's Department testified as a gang expert. The biggest gangs in the Altadena area are ABC, PDL, and the Project Gangsters. The first two gangs hate each other and have been feuding for many years. The Project Gangsters are friendly with the PDL gang. The primary activities of ABC include drug trafficking, weapons possession, aggravated assault (primarily on members of other gangs), and burglaries of residences. Jamaal Drane (Drane) is a member of ABC. He was convicted of assault with a deadly weapon (a semiautomatic firearm) in violation of section 245, subdivision (b), for the benefit of a criminal street gang. Christian Devon Davis is a member of ABC who was convicted of a violation of section 246.3, discharging a firearm in public.

Detective Pippin knew Duncan and Chetu as Crips gang members. A few months before Manning's homicide, Duncan and Chetu were at Johnny's Liquor, a known Crip hangout, and someone in a passing car shot Chetu. He was seriously wounded and went to the hospital. He and Duncan blamed the Bloods. Detective Pippin knew Steven Holmes as an ABC gang member whose moniker is Biscuit. Detective Pippin knew Manning as a Blood. Detective Pippin knew appellant and believed him to be an ABC member. This opinion was based on contacts with appellant, speaking with other officers who had contact with appellant, reviewing field identification cards, and conversations with rival gang members.

When given a hypothetical based on the facts of the instant case, Detective Pippin stated that Manning's shooting was for the benefit of a criminal street gang—either for retaliation, intimidation, or both. Gangs have to enforce their territory or be "run over."

Defense Evidence

Appellant presented no evidence on his behalf.

DISCUSSION

I. Sufficiency of the Evidence in Support of Guilty Verdicts

A. Appellant's Argument

Appellant contends that the evidence against him—the presence of his fingerprints on the Ford Focus among those of five other people, the presence of a cell phone connected to appellant in the Focus, and appellant's gang membership—does not amount to sufficient solid, credible evidence upon which to support his convictions.

B. Relevant Authority

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) "The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]"' [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.) The credibility of witnesses and the weight to be accorded to the evidence lie exclusively within the province of the trier of fact. (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790.) Reversal on this ground is unwarranted unless '"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."' (*People v. Bolin*, *supra*, 18 Cal.4th at p. 331.)

"Both aiders and abettors and direct perpetrators are principals in the commission of a crime. Penal Code section 31 defines 'principals' as '[a]ll persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission . . . .' (See Pen. Code, § 971 ['all persons concerned in the commission of a crime, who by the operation of other provisions of this code are principals therein, shall hereafter be prosecuted, tried and punished as principals . . . .'].)" (*People v. Calhoun* (2007) 40 Cal.4th 398, 402.) "[A]n aider and abettor will 'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

A conspiracy requires proof that the members "had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act" by one or more of them in furtherance of the conspiracy. (*People v. Morante* (1999) 20 Cal.4th 403, 416; § 182, subd. (a)(1).) Direct evidence of an agreement is not necessary to support a conviction. "Circumstantial evidence often is the only means to prove conspiracy. [Citations.] There is no need to show that the parties met and expressly agreed to commit a crime in order to prove a conspiracy. The evidence is sufficient if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.] The inference can arise from the actions of the parties, as they bear on the common design, before, during, and after the alleged conspiracy. [Citation.]" (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 999; see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135 ["'The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy'"].)

C. Evidence Sufficient in Counts 1 and 4

Employing the standards set out, *ante*, we conclude the evidence was sufficient to support the verdicts of guilty in the murder and conspiracy to murder charges. Although, as appellant points out, there was no eyewitness identification of appellant, there were no eyewitness identifications or descriptions of any of the persons in the Ford Focus. Smith stated only that the hand he saw appeared to be that of a Black person.

The evidence showed that Bowen, appellant's girlfriend, left her cell phone in appellant's custody when she was arrested on January 5, 2006. This phone, "the Bowman phone," was found in the Focus on the rear floorboard. Appellant's fingerprints were found on the Focus, and the jury could have reasonably inferred that Allah, appellant's fellow gang member, rented the car for the express purpose of carrying out the retaliatory drive-by shooting. The car was rented at around noon on January 19, and the shooting took place the next night, shortly after midnight. The record showed that the shooting was likely in retaliation for a drive-by shooting by Blood gang members that wounded Chetu, an ABC member, earlier in January. Although it is unlikely that all five of the persons whose prints were on the car were in the car during the shooting, other evidence led to the inference that appellant participated in the drive by. It was not necessary for him to have been riding in the car in order to have aided and abetted the murder or to have been a coconspirator. (See CALJIC Nos. 3.01, 4.51, 6.10.)

Jamaal's statement to police, which the jury heard, incriminated appellant. Despite Jamaal's efforts to claim the police fed him every line, his credibility on the witness stand was nil, as the trial court itself noted. Jamaal said during his interview that appellant told him "Biscuit's a rider" when he called Jamaal shortly before the Manning murder, although Jamaal did not know if Tiny was in the shooter's car or not. Appellant phoned Jamaal again and told him to call his people and "see what's the word is." These statements show that appellant was closely involved in planning the shooting.

As the trial court noted in its ruling on appellant's new trial motion, the cell phone calls as well as the fact that the Bowman phone was found in the car, were very damning

to appellant. The record shows that the only call from the Bowman phone to Jamaal on the night of the murder was at 12:13 a.m., approximately 10 minutes before the murder. The jury could reasonably infer that this was the "Biscuit's a rider" call, which demonstrates appellant's awareness of, and complicity in, the impending shooting. Approximately 10 minutes after the murder, the Bowman phone called Foster's cell phone, and a minute later, Foster's cell phone called back. Also, approximately 10 minutes after the murder, the Bowman phone called Denham, Allah's ex-girlfriend.

As stated previously, circumstantial evidence may be sufficient to connect the defendant to a crime and prove his guilt beyond a reasonable doubt, and in this case, we have sufficient circumstantial evidence showing appellant's involvement in the planning and aftermath of the shooting. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.) The circumstantial evidence clearly showed appellant's involvement in the drive-by shooting as an aider and abettor and as a coconspirator.

D. Evidence Insufficient in Count 2

We agree with appellant that the evidence was insufficient to show that he had constructive possession of a firearm during the events of January 20 to January 21, 2006. The evidence shows at a minimum that appellant was an aider and abettor and coconspirator by his participation in the planning of the shooting, his communications with Jamaal showing his knowledge of the impending crime, and the use of his cell phone by the shooter or shooters and passengers if not by himself. However, the evidence does not show appellant was necessarily in the Ford Focus. The telephone evidence and Jamaal's statement to police did not implicate appellant as an actual shooter or as being necessarily in the car. Therefore, there is no substantial evidence that appellant had

constructive possession of the firearm or firearms in the car, and the conviction in count 2 must be reversed.

II. Denial of Posttrial Access to Jurors

A. Appellant's Argument

Appellant contends that the trial court erred in prohibiting appellant's requested posttrial access to jurors. Because two jurors had access to highly prejudicial information that should have been excluded, under the facts of this case, the limited access to jurors sought by appellant should have been granted.

B. Proceedings Below

When the prosecutor played a recording of Jamaal's interview with police, he provided the jury with a transcript, People's exhibit No. 10. On the following day, defense counsel pointed out to the court that the prosecutor had neglected to redact the transcript as had been done in appellant's first trial. Counsel explained that he and the prosecutor had agreed to redact the information that Bowen was arrested for possession of a .380-semiautomatic handgun while appellant and some other men were a few feet away from the car in which she was seated and where the gun was found. As interpreted by defense counsel, the transcript contained a statement by Deputy Long saying, "She's the one— referring to Bowen—she's the one that Joel and I locked up. It was his gun, referring to Cooper, but she took the fall for him." Defense counsel moved for a mistrial because the jury members had copies of the transcript, and the statement was inadmissible hearsay and prejudicial under Evidence Code section 352.[6]

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6 The offending dialogue that was redacted in the subsequently amended transcript read as follows:

"FINNEY: Who's, uh, who's Biscuit's girl? Do you know?
"LONG: He doesn't have one.
"FINNEY: Cooper's girl?
"LONG: Travis's? Ha, ha, ha.
"CHARLES: *** yeah.
"LONG: ***name is Cecelia. She's –
"FINNEY: Oh, but she's in custody.

The prosecutor stated that he had blacked out the offensive lines and made new copies of the transcript for the jurors. The tape played the previous day had not yet reached the offending portion of the transcript. The prosecutor had also substituted a redacted recording. When the jury entered the courtroom, the trial court asked if any jurors had read beyond the point in the transcript that corresponded to what had been played the previous day. Juror Nos. 5 and 8 had read the entire transcript. Juror No. 14 had gone "a little ahead." Only two of these jurors proceeded to deliberations.

After hearing argument in chambers, the trial court ruled it would admonish the jury that the tape is the evidence and the transcript is offered only to assist in understanding the recording. The court also suggested that the prosecutor elicit from Deputy Long that officers often say erroneous information in interviews in order to elicit information from suspects. The trial court stated the initial transcripts would be removed and the jurors would be informed there had been errors in the transcripts. With that, the trial court denied the mistrial motion and admonished the jury as it had indicated it would.

After the verdicts were rendered, the trial court received defense counsel's petition to release juror information in order to verify and develop facts to present to the court in a motion for new trial. Defense counsel suggested that he and his investigator privately question the jurors in the courthouse, obviating the need to learn their names, addresses, and telephone numbers.

At the hearing on the petition, defense counsel argued that at least two jurors had received information in the transcript that they should not have received. The defense did not know the effect the information had on the jurors, or if the other 10 jurors received the information. Appellant had the right to investigate the situation.

The trial court reminded counsel of the admonishments it had given the jury and stated that it would have been jury misconduct to ignore those admonitions and consider

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"LONG: She's the one, she's the one that Joel and I locked up. It was his gun, but she took the fall for him."

the offending material. Defense counsel had offered nothing to show that any of the jurors had violated the admonitions.

Defense counsel told the court that he had not been able to speak with the jurors after the trial because of a disruption appellant had caused when the verdicts were read and because the jurors had been "secluded from us." Counsel believed that the bell could not be "unr[u]ng," and the type of evidence received was very prejudicial, since the homicide involved a shooting and no gun was ever recovered. Counsel pointed out that he was not asking for names, addresses, or telephone numbers. He wished only for the court to summon the jurors so that counsel could question them.

The trial court believed that the statement in the transcript that appellant's girlfriend took the blame for a gun that belonged to appellant was ambiguous, since it was not clear to which gun the statement referred. It was not clear when the incident happened or if the gun was the one used in the Manning shooting. The trial court stated, "I think frankly, to be blunt, you're on a fishing expedition." The court added, ". . . you don't have any indication that there was jury misconduct. No trial is perfect. In every trial mistakes are made, virtually every trial. And often those mistakes can be eradicated by judicial admonitions, to tell jurors to ignore certain things that were inappropriate. And I think this is such a situation." The trial court said that there must be a prima facie showing of need before invading the privacy of jurors. The trial court ruled that the defense had not met its burden.

Defense counsel included many of the same arguments in his motion for a new trial, and he contended that prejudice was presumed. The court stated that the matter had been "nipped . . . in the bud." The trial court found the prejudice to be minimal, stating that there was no showing that the jurors shared, retained, or even appreciated what they had read. The trial court denied the new trial motion, stating that the totality of the evidence persuaded the court beyond a reasonable doubt that appellant was guilty of the offenses.

C. Relevant Authority

Code of Civil Procedure sections 206 and 237 govern the release of juror information. (See *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1087.) Code of Civil Procedure section 206, subdivision (g), provides that a defendant may petition the court for personal juror identifying information for, inter alia, the purpose of developing a motion for new trial.[7] (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 552 (*Rhodes*).) Code of Civil Procedure section 237, subdivision (b) requires that a petition for juror identifying information be supported by a declaration that includes facts sufficient to establish good cause.[8] (*People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1319-1322 & fn. 8 (*Jefflo*); see also *People v. Carrasco* (2008) 163 Cal.App.4th 978, 990.) When the basis for disclosing juror identification is an allegation of juror misconduct, a defendant must "set[ ] forth a sufficient showing to support a reasonable belief that jury misconduct occurred . . . ." (*Rhodes*, *supra*, 212 Cal.App.3d at pp. 551-552; *Jefflo*, *supra*, 63 Cal.App.4th at p. 1322.) The misconduct alleged must be "'of such a character as is likely to have influenced the verdict improperly.'" (*Rhodes*, at p. 554.) A petition to

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[7] Code of Civil Procedure section 206, subdivision (g) provides: "Pursuant to Section 237, a defendant or defendant's counsel may, following the recording of a jury's verdict in a criminal proceeding, petition the court for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose. This information consists of jurors' names, addresses, and telephone numbers. The court shall consider all requests for personal juror identifying information pursuant to Section 237."

[8] Code of Civil Procedure section 237, subdivision (b), provides in pertinent part: "Any person may petition the court for access to these records. The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information, . . . If the court does not set the matter for hearing, the court shall by minute order set forth the reasons and make express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure."

disclose juror identification information must be supported by more than mere speculation and may not be used as a "'fishing expedition[ ]' by parties hoping to uncover information to invalidate the jury's verdict ." (*Id.* at p. 552.)

We review a trial court's denial of a petition for access to personal juror identification information under an abuse of discretion standard. (*People v. Jones* (1998) 17 Cal.4th 279, 317; *People v. Carrasco*, *supra*, 163 Cal.App.4th 978, 991; *People v. Santos* (2007) 147 Cal.App.4th 965, 978.)

D. No Abuse of Discretion or Error

We conclude that the trial court did not abuse its discretion in denying the petition, even though appellant did not request names, addresses, or telephone numbers, but only an in-court questioning of the jury members. The record amply supports the trial court's view that its admonishments to the jurors overcame any prejudice caused by the two jurors who read further in the transcript before it was redacted. The trial court clearly admonished the jurors that the erroneous transcript was not to be considered, stating, "Ladies and gentlemen, the transcript that you were giv[en] yesterday that has since been retrieved had errors in it. Now, I want you to understand that the testimony, rather, the evidence of [Jamaal's] statements will be the tape or the CD that will be played. . . . That is the evidence of the interview and [Jamaal's] statements. The script was given to you merely to assist you in understanding the interview. The transcript given to you yesterday was not evidence, and I'm ordering that you ignore that transcript, to the extent you can recall what was in that transcript. That transcript is not evidence. It was an error, and that's been retrieved and will not be part of the record here. We will provide a different transcript that is accurate that reflects the correct—what the prosecution believes is the correct language of the interview. Anybody have any questions about what I just indicated? All right. Let's proceed."

When the amended transcripts were handed to the jury, the trial court again admonished the jury members, stating, "Again, ladies and gentlemen, these are being given to you to assist you in understanding the tape. The actual record of the interview is

the tape and not the transcript." The court subsequently admonished the jury as follows: "Ladies and gentlemen, as we play this tape or this CD, it's important for you to understand that the statements of the officers are not testimony. The officer's statements are to be considered to the extent they give meaning or give context to the statements of Mr. Charles. This tape is being played to show Mr. Charles' previous statements. It's not being played to show the statements of the officers. But the officers' statements on the tape are to be considered to help you understand what Mr. Charles said. So if you hear an assertion, a bald assertion by an officer on the tape, that's not evidence of the truth of that assertion. But if Mr. Charles were to admit or partially admit the truth of the officer's assertion, you can consider that."

After consulting with the trial court and defense counsel, the prosecutor mentioned the redactions in his direct examination of Detective Finney. The prosecutor stated, "On the second segment, there is a portion that's been redacted, that's been blacked out. That was blocked out because it's irrelevant to this case, and all parties agreed that that didn't need to be there; right?" Detective Finney agreed.

Given the measures taken by the trial court and the lack of any showing by defense counsel that jury misconduct occurred, we find no abuse of discretion. Moreover, in its jury instructions, the trial court told the jury that it must not "consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken by the court; treat it as though you had never heard of it." (CALJIC No. 1.02.) "Jurors are presumed to understand and follow the court's instructions." (*People v. Holt* (1997) 15 Cal.4th 619, 662.) "We can, of course, do nothing else. The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions." (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) In the instant case, there is no basis to overturn the discretionary decision of the trial court, as it was well within the bounds of reason.

III. Concurrent Sentence in Count 4

A. Appellant's Argument

Appellant contends that the trial court erred in imposing a concurrent sentence in count 4. The trial court expressly found that count 4 arose from the same occasion and set of operative facts, and the prosecutor stated that the sentence in that count should be stayed.

B. Relevant Authority

Section 654 provides in relevant part: "(a) An[y] act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The protections of section 654 extend to situations in which several offenses are committed during an indivisible course of conduct. (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1248.) Indivisibility is determined by the defendant's intent and objective. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) If all the offenses are incidental to, or the means of accomplishing or facilitating a single objective, the defendant may be punished for any one offense but not more than one. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

C. Sentence in Count 4 Must be Stayed

In count 1, appellant was convicted of first degree murder. In count 4, appellant was convicted of conspiracy to commit a crime, to wit, murder. Respondent concedes that appellant's sentence in count 4 should be stayed under section 654 because it was based on the same acts as those underlying his conviction for murder, and we agree. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 866 [a defendant may not be punished for both the murder and the conspiracy under section 654].)

IV. Sufficiency of the Evidence in Support of Gang Allegations

A. Appellant's Argument

Appellant was granted leave to file a supplemental brief alleging that the true finding on the gang enhancements in counts 1, 2, and 4 must be reversed because the

prosecution's evidence was insufficient to establish a pattern of criminal activity, one of the elements required to support this allegation. (§ 186.22, subd. (e).) In addition, because the firearm allegations under section 12022.53 were found true only as to use by a principal under section 12022.53, subdivisions (d) and (e)(1) and not as to personal use by appellant, these true findings must be reversed along with the true findings on the gang allegations.

B. Relevant Authority

The same principles recited previously in reviewing the sufficiency of the evidence of substantive crimes apply to claims of insufficiency of the evidence to support a jury's true finding on a gang allegation. (*People v. Ortiz* (1997) 57 Cal.App.4th 480, 484; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.)

A "'pattern of criminal gang activity'" is shown by "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" of the offenses listed in section 186.22, subdivision (e). At least one of the offenses must have occurred after the effective date of the statute. The last of the named offenses must have occurred within three years after a prior offense. The offenses must have been committed on separate occasions, or by two or more persons. (§ 186.22, subd. (e).)

C. Evidence Sufficient

Appellant correctly points out that one of the predicate crimes set forth by the prosecution and testified to by Detective Pippin—Christian Devon Davis's conviction of violating section 246.3—is not listed in section 186.22, subdivision (e). It therefore does not qualify as a predicate offense for the purpose of showing that a gang engages in a pattern of criminal activity.

For the second predicate offense, the prosecutor presented a certified document attesting to Drane's conviction for assault with a semi-automatic firearm in violation of section 245, subdivision (b) and his admission of a gang allegation pursuant to section 186.22. The record shows that this conviction occurred on July 25, 2002. Therefore,

appellant argues, although the instant offenses could be used to establish another predicate offense, appellant's conviction on July 11, 2008, came too late for his offenses to be combined with Drane's in order to prove a pattern of criminal activity by the gang.

As the jury was instructed, for the gang enhancement to apply, the prosecution had to show that the gang engaged in a pattern of criminal activity (commission of two or more predicate offenses) during the statutorily defined period (at least one offense committed after September 26, 1988) with the last of the offenses committed *within three years* of a prior offense. (§ 186.22, subd. (e); *People v. Gardeley* (1996) 14 Cal.4th 605, 616-617; *People v. Fiu* (2008) 165 Cal.App.4th 360, 388; see CALJIC No. 17.24.2.) Here, there was almost a six-year gap between Drane's conviction and appellant's. As a result, there was insufficient evidence to establish the time element of the pattern of criminal gang activity, the requirement that the last of the offenses must "[have] occurred within three years after a prior offense[]" based on Drane's and appellant's convictions. (§ 186.22, subd. (e); *People v. Gardeley*, *supra*, 14 Cal.4th at p. 625.)

Respondent's supplemental reply brief argues that the circumstances of the charged incident were enough to establish a pattern of criminal activity. Respondent cites *People v. Loeun* (1997) 17 Cal.4th 1 (*Loeun*) for the proposition that the prosecution can establish the requisite pattern exclusively through evidence of crimes committed contemporaneously with the charged incident. (*Id*. at p. 10.) Respondent points out that the gunfire that killed the victim was fired from a car. As a result, respondent contends, the offense of discharging a firearm from a motor vehicle (§ 12034, subds. (a) & (b)) was committed, which is an offense that qualifies as a predicate offense under section 186.22, subdivision (e)(6). In addition, the car from which the shots were fired had at least two occupants—the driver and the shooter. Thus, appellant's conviction for murder is one predicate offense (§ 186.22, subd. (e)(3)), and the offense of discharging a firearm from a motor vehicle qualifies as the second predicate offense. Therefore, two predicate offenses were committed by two or more people during the charged incident, and a pattern of criminal gang activity was established.

It is true that *Loeun* states that "[t]he pertinent statutory language does not require proof . . . that the two or more predicate offenses must have been committed both on separate occasions and by different persons. Under the statute, the pattern of criminal gang activity can be established by proof of 'two or more' predicate offenses committed 'on separate occasions, *or* by two or more persons.'" (*Loeun, supra,* 17 Cal.4th at p. 9.) "[W]hen the prosecution chooses to establish the requisite 'pattern' by evidence of 'two or more' predicate offenses committed on a single occasion by 'two or more persons,' it can, as here, rely on evidence of the defendant's commission of the charged offense and the contemporaneous commission of a second predicate offense by a fellow gang member." (*Id*. at p. 10.) It was well established prior to *Loeun* that the charged offense can be a predicate offense. (*People v. Gardeley, supra,* 14 Cal.4th at p. 625; *People v. Olguin, supra,* 31 Cal.App.4th at p. 1383.)

In *Loeun,* the defendant (Loeun) was charged with and convicted of assaulting Jose Ivan Corral (Corral) with a deadly weapon, and the jury found that the crime was committed for the benefit of a criminal street gang. (*Loeun, supra,* 17 Cal.4th at pp. 5, 7.) Corral was pursued by a group of 40 or 50 Asian youths, and Loeun, wielding a baseball bat, was one of them. (*Id*. at p. 5.) During a verbal exchange with Corral, Loeun said he was a Cambodian Crip. (*Id*. at p. 6.) Loeun hit Corral with a baseball bat in several places. Seconds later another member of the Asian group, Chad Hen (Hen), struck Corral in the ribs with a tire iron. Loeun and Hen were arrested. Both admitted being members of a Cambodian Crip gang, CWA, to the investigating officer, Detective Boyd. Detective Boyd testified at Loeun's trial about his conversations with Hen and appellant in which they admitted being members of CWA. (*Ibid*.)

Loeun challenged the gang enhancement on the ground that proof of the offense charged against him and another offense committed on the same occasion by a fellow gang member was insufficient to establish the requisite pattern. The Court of Appeal disagreed, and the California Supreme Court granted Loeun's petition for review. (*Loeun, supra,* 17 Cal.4th at p. 7.) The Supreme Court agreed with the Court of Appeal

that evidence of the two separate acts of assault with a deadly weapon committed by Loeun and Hen on the same occasion was sufficient to satisfy the statutory requirement of two or more predicate offense. (*Id*. at p. 8.)

Given the nature of the offense of discharging a firearm listed in section 186.22, subdivision (e)(6) and the quantity of evidence (such as the wound on Allah's head) that showed Allah, appellant's fellow gang member, drove the Ford Focus into enemy gang territory for purposes of the shooting, we must agree with respondent that, under *Loeun*, the evidence presented in this case was sufficient to support the true finding on the gang enhancement. Section 12034, subdivision (a) provides that it "is a misdemeanor for a driver of any motor vehicle or the owner of any motor vehicle . . . knowingly to permit any other person to carry into or bring into the vehicle a firearm in violation of Section 12031 [carrying a loaded firearm] of this code . . . ." Subdivision (b) provides that "[a]ny driver or owner of any vehicle, whether or not the owner of the vehicle is occupying the vehicle, who knowingly permits any other person to discharge any firearm from the vehicle is punishable by imprisonment in the county jail for not more than one year or in state prison for 16 months or two or three years." There was evidence that the shots were fired from the passenger side of the vehicle in ABC's enemy's territory, indicating that the shots were fired with Allah's knowledge and permission.

Allah was not tried with appellant, just as Hen was not tried with Loeun. The evidence of Hen's actions was introduced through the testimony of the investigating detective, and the evidence of Allah's participation was introduced by Detective Kinney, Denham, and others. Under the circumstances of this case, we cannot reverse the true finding on the gang allegation on the ground that the prosecution failed to show a pattern of criminal activity, and the related firearm enhancements must stand. Appellant's murder conviction and Allah's commission of the offenses described in section 12034, subdivisions (a) and (b) provide a basis for finding a pattern of criminal gang activity.

V. Amendment to Abstract of Judgment

Appellant contends the abstract of judgment must be amended to reflect that appellant's 25-years-to-life firearm enhancement was imposed under section 12022.53, subdivisions (d) and (e)(1), which reflects firearm-use by a principal rather than personal use, as described in section 12022.53, subdivision (d). Appellant is correct. The prosecutor was permitted to amend the information to allege that the firearm-use enhancement was charged under section 10222.53, subdivisions (d) and (e)(1), but the verdict forms were not corrected.

DISPOSITION

The judgment in count 2 is reversed. The sentence in count 4 is stayed pursuant to section 654. In all other respects, the judgment is affirmed. The superior court is directed to prepare a new abstract of judgment reflecting these changes and correcting the firearm-use enhancement to show that it was found true under section 12022.53, subdivisions (d) and (e)(1), and forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ